



FINAL DETERMINATION

IN THE MATTER OF

**JONATHAN LAI,
Requester**

v.

**BENSALEM TOWNSHIP
POLICE DEPARTMENT,
Respondent**

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Docket No: AP 2019-1175

INTRODUCTION

Jonathan Lai (“Requester”), a reporter with the Philadelphia Inquirer, submitted a request (“Request”) to the Bensalem Township Police Department (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking a copy of slides presented at a conference. The Department denied the Request, arguing that release of the record could jeopardize public safety. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **denied in part**, and the Department is required to take further action as directed.

FACTUAL BACKGROUND

On June 25, 2019, the Request was filed, seeking a copy of records related to a presentation about a policing program at Bensalem High School, including:

1. A copy of that presentation, including any slides and prepared notes.
2. A copy of the policies, procedures, or rules documents for the programs described in the presentation.

3. A copy of all contracts related to those programs, including for purchase of property, installation, maintenance and operation.

On June 28, 2019, the Department denied the Request, asserting that records responsive to Items 1 and 2 are exempt because disclosure was reasonably likely to jeopardize a public safety activity, 65 P.S. § 67.708(b)(2), and that records responsive to Item 3 do not exist.

On July 18, 2019, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.¹ The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On July 29, 2019, the Department submitted a position statement, arguing that the responsive presentation materials are the property of Motorola Solutions, and reiterating its argument surrounding the presentation materials. In support of this statement, the Department submitted the affidavit of Lieutenant Keith Christie, who attests that the presentation materials and policies contain specific information about security at Bensalem High School, and that revealing the information was likely to allow threatening individuals to thwart public safety practices.

On August 8, 2019, in response to an inquiry by the OOR, the Department submitted the supplemental affidavit of Lieutenant Christie, who attests that the Department does not know exactly who was at the presentation, that the presenter gave the presentation as part of his duties, that the materials were prepared by Motorola Solutions for the purpose of marketing, and that more detailed information about the security protocols would allow an intruder to avoid areas where security measures were deployed or to circumvent early warning systems.

¹ The Requester also specifically declined to appeal Item 3 of the Request.

On August 13, 2019, the OOR ordered an *in camera* review of the presentation materials. The Department submitted the materials on August 16, 2019, and the OOR subsequently conducted its review.

LEGAL ANALYSIS

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the parties did not request a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The Department is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a local agency are presumed public unless

exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. The Department must provide redacted copies of the presentation materials that are responsive to Item 1

Item 1 of the Request seeks a copy of the presentation materials used in Deputy Director McVey’s presentation at the 2019 International Association of Chiefs of Police Technology Conference. The Department argues both that the presentation materials contain information the disclosure of which would be reasonably likely to create a danger to public safety and that the materials were created by Motorola Solutions for the presentation, and not by the Department.²

² Although the materials are marked with Motorola Solutions’ logo, they were created for Deputy Director McVey’s use during the conference. On August 9, 2019, the Department acknowledged that the presentation was done in the course of the Deputy Director’s official duties. The RTKL defines a record as “[i]nformation, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained [...] in connection with a transaction, business or activity of an agency.” 65 P.S. § 67.102. Therefore, because the

Section 708(b)(2) of the RTKL provides that records “maintained by an agency in connection with ... law enforcement ... that if disclosed would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity[.]” are exempt from disclosure. 65 P.S. § 67.708(b)(2). In order to establish this exemption, an agency must show: (1) the record at issue relates to law enforcement or public safety activity; and (2) disclosure of the record would be reasonably likely to threaten public safety or a public protection activity. *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 374-75 (Pa. Commw. Ct. 2013); *Adams v. Pa. State Police*, 51 A.3d 322 (Pa. Commw. Ct. 2012). “Reasonably likely” has been interpreted as the likelihood that disclosure would cause the alleged harm “requiring more than speculation.” *Carey*, 61 A.3d at 375.

In support of this argument, the Department submitted the affidavit and supplemental affidavit of Lieutenant Christie, who attests that:

5. The requested PowerPoint presentation from the May 20, 2019 conference contains specific and detailed information regarding the security protocols and methods of protection for a specific school within the Bensalem School District (“District”).

6. These safety protocols serve to protect students and if the information were to become public the methodologies used to protect schools within the District would be substantially weakened to the point of being nearly completely ineffective.

7. ...[T]he presentation was given at the annual International Association of Chiefs of Police meeting which is open to members, qualified non-members, and exhibitors. Recording and dissemination of the presented materials was expressly prohibited, and the intended audience was law enforcement professionals.

The Department was unable to provide the OOR with detailed information regarding attendance at the conference. Because the attestation did not provide any specific explanation of how the PowerPoint materials would reveal safety protocols or how they related to the Department’s law enforcement function, the OOR conducted an *in camera* review of the

record was received by the Department in connection with official business, it is presumptively a record of the Department.

presentation materials. *See Pa. State Police v. ACLU of Pa.*, 189 A.3d 37 (Pa. Commw. Ct. 2018), *appeal pending*, *Pa. State Police v. ACLU*, 406 MAL 2018) (holding that the OOR should rely on affidavits if they are sufficient rather than performing *in camera*).

A review of the presentation materials shows that two slides contain images of the Department's work at the school, with one depicting the location of various implemented security systems and another showing images of several camera feeds. The image depicting the school clearly contains the location and type of safety protocols created by the Department, and Lieutenant Christie's affidavits are sufficient to show that revealing this image could impair a public security function. *See e.g., Sharpe v. Chambersburg Area Sch. Dist.*, OOR Dkt. AP 2013-0363, 2013 PA O.O.R.D. LEXIS 190 (finding that records containing maps and plans showing school evacuation protocols are exempt).

The remainder of the slides, however, contain no specific information about the Department's efforts to improve safety at the school, and the OOR cannot determine any specific threats to safety from either the face of the record or from the Department's attestations. In order to show a reasonable likelihood of jeopardy under Section 708(b)(2) of the RTKL, "[a]n agency must offer more than speculation or conjecture." *California Borough v. Rothey*, 185 A.3d 456, 468 (Pa. Commw. Ct. 2018). The Commonwealth Court has "defined substantial and demonstrable [risk] as actual or *real and apparent*." *Borough of Pottstown v. Suber-Aponte*, 202 A.3d 173, 180 (Pa. Commw. Ct. 2019) (emphasis in original) (quoting *Carey*, 61 A.3d at 373). Therefore, because the Department has not identified any specific threats from release of the slides that do not contain depictions of the school and its security systems, those slides must be released. The two slides described above may be redacted.

2. The protocols responsive to Item 2 are exempt in part

Item 2 of the Request seeks “a copy of the policies, procedures, or rules documents for the programs described in the presentation.” The Department denied this part of the Request under Section 708(b)(2), arguing that release of policy documents underlying school security would render the security measures described useless. In support of this argument, the Department submitted the affidavit and supplemental affidavit of Lieutenant Christie, who attests that:

[T]he policies and procedures for implementing these vital security measures contain details which could be used to undermine District security and place students at risk.

The way that the District implements security measures in its schools is clearly not intended for public dissemination. These policies and procedures were developed to protect every individual student, teacher, and employee of the District. However, the policies are also implemented to protect specific students and employees from individuals who have been identified as threats to their safety. The District cannot be expected to name these individuals or divulge how they are protected.

The manner of security protocols at issue concern methods used to protect Township facilities. Specifically, the materials provide detailed visual descriptions of where these protective measures are deployed.

These security measures would be weakened by the disclosure of the requested materials in two ways. First, disclosure of the security measures at the school would allow persons intending to do harm to students and/or staff to circumvent the areas where these measures are deployed, rendering them ineffective. Second, the requested materials contain a more detailed description of security and response measures which would similarly allow someone who intends to do harm to circumvent the early warning system.

The Department does not list the protocols or policies that it believes are responsive to the Request, but the record contains sufficient information to apprise the OOR that the responsive policies include methods for tracking the movements of individuals. The OOR has repeatedly held that an agency may withhold policies and procedures which describe the tactical disposition of law enforcement in various dangerous situations, including use of force policies and response

procedures. *See, e.g., McFalls v. Norristown Police Dep't*, OOR Dkt. AP 2019-0881, 2019 PA O.O.R.D. LEXIS 827 (permitting the police department to redact the tactical sections of a use of force policy, but not the reporting requirements); *Benzing & PublicSource v. Churchill Borough*, OOR Dkt. AP 2018-1518, 2018 PA O.O.R.D. LEXIS 1282 (permitting the redaction of officer movement and response procedures). As such, the Department is permitted to withhold policies and procedures which detail how it detects and tracks threats to school security, including any policies for the protection of individuals or which identify the placement of the Department's safeguards. However, to the extent the Department possesses responsive administrative policies or protocols which do not identify tactics, it is required to provide them.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **denied in part**, and the Department is required to provide a copy of redacted presentation materials and any administrative responsive policies within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Bucks County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.³ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: September 9, 2019

/s/ Jordan Davis

APPEALS OFFICER
JORDAN C. DAVIS

³ See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

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